

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Applications of Nextel Communications, Inc. and) WT Docket No. 05-63
Sprint Corporation)
)
For Consent to Transfer Control of Licenses and)
Authorizations)
)
File Nos. 0002031766, *et al.*)

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 2005

Released: August 8, 2005

By the Commission: Commissioners Abernathy, Copps, and Adelstein issuing separate statements.

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I. INTRODUCTION

1. In this Order, we consider applications filed by Nextel Communications, Inc. ("Nextel") and Sprint Corporation ("Sprint") (collectively, the "Applicants") for consent to transfer control of all licenses and authorizations held directly and indirectly by Nextel to Sprint.¹ The Nextel licenses and authorizations include Specialized Mobile Radio Service ("SMR") licenses in the 800 and 900 MHz bands and licenses in the 1.9 GHz band that enable the provision of mobile telephone and related data services, licenses in the Broadband Radio Service ("BRS") in the 2150-2162 MHz band and in the 2500-2690 MHz band, spectrum leases in the BRS in the 2150-2162 MHz band and 2500-2690 MHz band, and spectrum leases in the Educational Broadband Service ("EBS") in the 2500-2690 MHz band.² The

¹ Applications of Nextel Communications, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, ULS File No. 0002031766, *et al.* (filed February 8, 2005) ("Applications").

² The term "2.5 GHz band" or "2500-2690 MHz" used throughout this Order includes both the 2150-2162 MHz band and 2500-2690 MHz band.

Applicants contemplate that the operations and assets of Nextel and Sprint would be combined, and that the merged entity would continue to provide its services in these bands under both the Nextel and Sprint brand names. Under the license transfer application before us, wireless affiliates of Nextel and Sprint would not become part of the merged entity.³

2. The proposed merger of Nextel's SMR and 1.9 GHz licenses used in providing mobile telephony services with Sprint's broadband Personal Communications Service ("PCS") licenses would combine the licenses and operations of two large national wireless carriers that have overlapping coverage areas providing mobile telephony services throughout much of the United States. In this instance, the number of large nationwide carriers providing these services would be reduced from five to four. Because the proposed merger would combine largely overlapping mobile telephony coverage and services, these applications require us to examine the potential consequences of a merger that is largely horizontal in nature. In addition, the proposed combination of Nextel's and Sprint's holdings of BRS licenses and EBS leases in the 2.5 GHz band would result in geographic overlap in some parts of the country, while there would be significant areas of non-overlap in many other parts. Thus, the proposal to bring these BRS/EBS holdings together requires us to examine the potential consequences both of increasing the amount of BRS/EBS bandwidth controlled in certain markets, and of expanding the total geographic footprint covered by these licenses and leases.

3. Pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act"), we must determine whether the Applicants have demonstrated that the proposed transfers would serve the public interest, convenience, and necessity.⁴ Based on the record before us, and as discussed more fully below, we find that the transaction meets this standard. We recognize that this transaction will represent a second major step in consolidation of nationwide mobile operators in the U.S. within the past year, and that it will increase concentration in many markets based on the firms' current shares of subscribers. Based on the record as a whole and our analysis, we conclude that the transaction is unlikely to result in public interest harm in mobile telephony markets. We make this finding primarily because we find that, in the post-merger environment, there will be a continuing presence of multiple other substantial carriers in each overlap market with the capacity to add subscribers and the ability to add capacity. As a result, we believe this transaction is unlikely to result in collusive behavior or create "unilateral" market power on the part of the merged firm. We also find that there are no local markets where post-merger conditions would require a divestiture remedy. Sprint and Nextel have been the third, fourth, or later entrants into individual markets. Finally, we find that public interest benefits should result from this transaction and flow to consumers, including improved service quality and broader deployment of the next generation of advanced wireless services, despite the fact that the two networks will not be tightly integrated in the near term.

4. With regard to the BRS and EBS licenses specifically, our analysis shows that this transaction is unlikely to result in public interest harm in the 2.5 GHz band. We believe that regardless of whether the efficient future use of the 2.5 GHz spectrum ultimately turns out to be mobile, portable, or fixed service, it is unlikely that this transaction will have a negative impact on competition. We envision that, under any of these scenarios, by the time this spectrum capacity is put to use, sufficient other spectrum should be available so that no undue market power will be conferred on the combined entity ("Sprint Nextel").

³ Application, Public Interest Statement at 14-17.

⁴ 47 U.S.C. §§ 214(a), 310(d).

II. BACKGROUND

A. Description of the Applicants

1. Nextel Communications, Inc.

5. Nextel is a publicly-traded Delaware corporation headquartered in Reston, Virginia.⁵ Nextel operates primarily SMR licenses in the 800 and 900 MHz bands and provides digital wireless voice and data communications services over its all-digital network based on Integrated Digital Enhanced Network ("iDEN") technology provided by Motorola, Inc.⁶ Nextel offers a bundled service that provides a customer with interconnected mobile voice along with trunked dispatch service (marketed under the brand name "Direct Connect") that allows instant, real-time conferencing on a one-to-one or one-to-many basis.⁷ Customers can also subscribe to other optional services, including paging, text/numeric messaging, and wireless Internet access.⁸ Nextel also holds BRS licenses and leases excess capacity from EBS licensees in the 2.5 GHz band.⁹ As a result of the Commission's 800 MHz rebanding plan, the Commission modified certain Nextel licenses to give Nextel a nationwide authority to operate in ten megahertz of contiguous spectrum in the 1.9 GHz band.¹⁰

6. In 1999, Nextel sold some of its 800 MHz SMR licenses to Nextel Partners, Inc. ("Nextel Partners") in exchange for a minority ownership interest in the company. Nextel Partners is also building out an iDEN network and Nextel assists Nextel Partners in obtaining terms similar to those Nextel receives from vendors for equipment and services.¹¹ Nextel Partners provides digital wireless telecommunications services using its own iDEN network under the Nextel brand name in mid-sized and rural U.S. markets.¹² As of December 31, 2004, Nextel owned about thirty-two percent of the outstanding common stock of Nextel Partners and about eighteen percent of the outstanding common stock of NII Holdings, Inc., which provides wireless communications services primarily in selected Latin American markets. Also, as of December 31, 2004, Legg Mason, Inc. owned 10.37 percent of Nextel shares outstanding.¹³ No other investor holds more than a ten percent ownership interest in Nextel.

7. Today, Nextel is the fifth largest provider of mobile telephony service in the United

⁵ Nextel Communications, Inc., Form 10-K (filed Mar. 15, 2005) ("Nextel 10-K"), available at <http://www.sec.gov/Archives/edgar/>.

⁶ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Third Report*, 13 FCC Rcd 19746, 19753 (1998) ("*Third Competition Report*"); Nextel 10-K at 1.

⁷ See Applications to Assign Wireless Licenses from Chadmoore Wireless Group to Various Subsidiaries of Nextel Communications, Inc., WT Docket No. 01-193, *Memorandum Opinion and Order*, 16 FCC Rcd 21105 ¶ 2 (2001) ("*Nextel-Chadmoore Order*").

⁸ Direct Connect[®] provides trunked dispatch customers with an expanded dispatch service area and higher voice quality and extra security than analog trunked dispatch. *Id.* at 21106 & n.4.

⁹ See *infra* Section V.B.1.a. In a small number of cases, Nextel is the licensee of EBS stations pursuant to the "wireless cable" exception to the EBS eligibility rules. See 47 C.F.R. 27.1201(c)(1).

¹⁰ Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order*, 19 FCC Rcd 14969 (2004) ("800 MHz Report and Order").

¹¹ *Id.*

¹² Nextel 10-K at 15; *Ninth Competition Report*, 19 FCC Rcd at 20689 n.165.

¹³ See Yahoo Finance, Quotes & Info, Nextel Communications, Inc. (NXTL) at <http://finance.yahoo.com/q/mh?s=NXTL>, (visited June 8, 2005).

States based on subscribership.¹⁴ As of December 31, 2004, Nextel provided service to over 16.2 million subscribers, which consisted of 15.0 million subscribers of Nextel-branded service and 1.2 million subscribers of Boost Mobile, a Nextel affiliate, and reported \$13.4 billion in operating revenues for 2004.¹⁵ Nextel together with its affiliate, Nextel Partners, currently utilize the iDEN technology to serve 297 of the top 300 U.S. markets where about 260 million people live or work.¹⁶

2. Sprint Corporation

8. Sprint is incorporated under the laws of the state of Kansas and headquartered in Overland Park, Kansas.¹⁷ Sprint holds PCS and BRS licenses.¹⁸ Sprint uses Code Division Multiple Access protocol ("CDMA") throughout its wireless network.¹⁹ Sprint has also deployed a 1xRTT voice and data network which provides wireless access to the internet and other data services.²⁰ In July 2005, Sprint announced that it had begun rollout of high-speed wireless data services using Evolution Data Optimized ("EV-DO") technology.²¹ Sprint provides wireline long distance and local telecommunications services.²² Sprint also holds BRS licenses and leases excess capacity from EBS licensees in the 2.5 GHz band.²³

9. The Sprint network of operations consists of Sprint PCS and independent affiliates.²⁴ Sprint PCS is the subsidiary of Sprint Corporation that provides wireless telephony service.²⁵ Each of the affiliates has an agreement with Sprint PCS to use the latter's PCS licenses to deploy CDMA technology and Sprint PCS-branded service in specific areas of the country.²⁶ In return, Sprint PCS receives a percentage of the affiliates' local service revenue.²⁷ In addition, Sprint PCS performs back-office tasks for most of its affiliates, including billing and customer service.²⁸ Recently, Sprint has renegotiated these arrangements with some of its affiliates, responding to disputes with, as well as the financial difficulties

¹⁴ *Ninth Competition Report*, Table 4 at Appendix A, A-8.

¹⁵ Nextel 10-K at 1.

¹⁶ *Id.*

¹⁷ Sprint Corporation, Form 10-K, at 2 (filed Mar. 11, 2005) ("Sprint 10-K"), available at <http://www.sec.gov/Archives/edgar/data>.

¹⁸ Application, Exhibit 1 at 13.

¹⁹ Application, Public Interest Statement at 11.

²⁰ *Id.* at 26.

²¹ *Sprint Begins Launch of EV-DO Wireless High-Speed Data Service*, News Release, Sprint, July 7, 2005.

²² *Id.* at 12.

²³ See *infra* Section V.B.1.a. In a small number of cases, Sprint is the licensee of EBS stations pursuant to the "wireless cable" exception to the EBS eligibility rules. See 47 C.F.R. 27.1201(c)(1).

²⁴ The Applicants stated that Sprint had relationships with twelve independent affiliates. See Application, Public Interest Statement at 17. An Informal Request for Commission Action by one of these affiliates, US Unwired, Inc., ("US Unwired") is addressed below. See *infra* Section V.C.2.

²⁵ Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc. to AT&T Corp., CS Docket No. 98-178, *Order*, 17 FCC Rcd 8985 ¶ 2 (1998).

²⁶ See *Ninth Competition Report*, 19 FCC Rcd at 20629.

²⁷ *Id.*

²⁸ *Id.*

of, certain affiliates.²⁹ The amended agreements cover approximately forty percent of the customers served by all affiliates.³⁰

10. Currently, Sprint is the third largest provider of mobile telephone voice and related data services in the United States in terms of subscribership.³¹ Sprint PCS had 24.7 million customers as of December 31, 2004: 17.8 million direct, postpaid subscribers, 3.2 million through affiliates, and 3.7 million wholesale subscribers.³² Sprint reported \$14.6 billion in revenues for 2004.³³ Sprint's CDM A network is now available in 99 percent of the major metropolitan areas in forty-eight states, the Virgin Islands, and Puerto Rico. Sprint, together with third party affiliates, operates PCS systems in over 350 metropolitan markets, including the 100 largest U.S. metropolitan areas, and reaches approximately 250 million people.³⁴ Sprint has been able to increase its coverage area by entering into roaming agreements with various carriers throughout the United States.³⁵

B. Description of Transaction

11. On December 15, 2004, Sprint and Nextel entered into an agreement for a merger to combine operations and assets valued at approximately \$70 billion.³⁶ Upon consummation of the merger, Nextel would be merged into S-N Merger Corp, a wholly owned subsidiary of Sprint, and Sprint's name would be changed to Sprint Nextel Corporation ("Sprint Nextel").³⁷ After closing, the merged company intends to spin off its incumbent local exchange carrier ("ILEC") assets to its shareholders.³⁸ As currently planned, the merged entity's executive headquarters would reside in Reston, Virginia, and its operational headquarters would be in Overland Park, Kansas.³⁹ Sprint Nextel will be led by a board of directors drawn equally from the pre-merger boards of the two companies. The merger would be achieved through a stock-for-stock transaction with Nextel shareholders receiving 1.3 shares of Sprint common stock and \$.50 in cash for each Nextel common share. The actual stock/cash allocation is subject to adjustment in order to facilitate the spin-off of Sprint's local telecommunications business on a tax-free basis, and will be determined at the time of the merger. The equity interests in Sprint and Nextel are being valued equally in the merger, and the stock/cash allocations in the Merger Agreement are designed so that Nextel's existing shareholders will own slightly less than 50 percent of Sprint's common stock.⁴⁰

12. The Applicants' respective current spectrum holdings that are used in the provision of mobile telephony services are set out in detail in the Application.⁴¹ Nextel currently holds up to 14

²⁹ *Id.*

³⁰ *Ninth Competition Report*, 19 FCC Rcd at 20630.

³¹ *Id.*, Table 4 at Appendix A, A-8.

³² Sprint 10-K at 34.

³³ *Id.* at 4.

³⁴ *Id.* at 32.

³⁵ *Id.* at 3.

³⁶ Application, Public Interest Statement at 1.

³⁷ Application, Attachment A to Public Interest Statement at 2.

³⁸ Application, Public Interest Statement at 10.

³⁹ *Id.*

⁴⁰ Application, Public Interest Statement at 1-2 & n.1; *see also* Application, Attachment A at 2, 6.

⁴¹ *See* Application, Attachments E and J to Public Interest Statement.

megahertz in portions of the 800 MHz band in each of the 493 Basic Trading Areas ("BTAs")⁴², and as much as 4.75 megahertz in portions of the 900 MHz band.⁴³ In addition, when the Commission's 800 MHz Re-Banding Plan is considered,⁴⁴ Nextel holds 10 megahertz of spectrum in the 1.9 GHz band in each of the 493 BTAs. Sprint currently holds broadband PCS licenses in 490 BTAs,⁴⁵ and its spectrum aggregation ranges up to 40 megahertz. As a result of this transaction, the merged entity would hold spectrum involving these licenses in all of the 493 BTAs, with overlaps in every BTA except Guam, American Samoa, and the Northern Mariana Islands.⁴⁶

13. With regard to the Applicants' current spectrum holdings (through licenses and spectrum leases) in the 2.5 GHz band, Nextel holds spectrum rights in this band in 281 BTAs; on average, 35.7 megahertz is licensed and 53.7 megahertz is leased.⁴⁷ Sprint, in turn, holds spectrum rights in 190 BTAs, of which, on average, 26.8 megahertz is licensed and 57.7 megahertz is leased.⁴⁸ Combining Sprint's and Nextel's holdings in the 2.5 GHz band would involve overlap of their existing licenses and leases in eighty-five BTAs.⁴⁹

C. Application and Review Process

1. Commission Review

14. On February 8, 2005, pursuant to section 310(d) of the Communications Act,⁵⁰ Sprint and Nextel filed: 33 applications seeking consent to the proposed transfer of control of licenses held by Nextel to Sprint; three applications for consent to transfer control of *de facto* lease authorizations from Nextel to S-N Merger Corp.; two applications for consent to transfer control of Satellite Earth Station authorizations from Nextel to Sprint; 13 applications for consent to transfer control of Cable Television Relay Service licenses from Nextel to Sprint; and five applications for consent to transfer control of Part 5 Experimental Radio Service authorizations from Nextel to Sprint. Sprint and Nextel also filed one application for transfer of control of Nextel's international section 214 authorization to Sprint.⁵¹

⁴² Basic Trading Areas ("BTAs") are Material Copyright (c) 1992 Rand McNally & Company. Rights granted pursuant to a license from Rand McNally & Company through an agreement with the Federal Communications Commission. BTAs are geographic areas drawn based on the counties in which residents of a given BTA make the bulk of their shopping goods purchases. Rand McNally's BTA specification contains 487 geographic areas covering the 50 states and the District of Columbia. For its spectrum auctions, the Commission added additional BTA-like areas for: American Samoa; Guam; Northern Mariana Islands; San Juan, Puerto Rico; Mayaguez/Aguadilla-Ponce, Puerto Rico; and the U.S. Virgin Islands. See *Ninth Competition Report*, 19 FCC Rcd at 20606 n.27.

⁴³ See Application, Attachment J to Public Interest Statement.

⁴⁴ See *Improving Public Safety Communications in the 800 MHz Band, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order*, 19 FCC Rcd 14969 (2004); *Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004).

⁴⁵ All BTAs except Guam, American Samoa, and the Northern Mariana Islands. See Application, Attachment F to Public Interest Statement.

⁴⁶ *Id.*

⁴⁷ Application, Public Interest Statement at 47.

⁴⁸ *Id.*

⁴⁹ *Id.* at 48.

⁵⁰ 47 U.S.C. § 310(d).

⁵¹ See *Nextel Communications and Sprint Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, Public Notice*, 20 FCC Rcd 4119, 4120-4122 (2005) ("Comment Public Notice").

15. The Applicants assert that approval of the proposed transaction is in the public interest for several reasons.⁵² For instance, the Applicants contend that the merged entity would combine companies with complementary strengths and make possible a richer set of products, services, and features in the future. Customers who need wireless broadband capabilities would be more interested in the CDMA service available on Sprint's network and handsets.⁵³ Customers who prefer the robust, instant-communication push-to-talk functionality of Direct Connect would be more attracted to Nextel's iDEN network and handsets.⁵⁴ The Applicants also contend that the merger would result in a number of technical benefits and efficiencies and lead to improved service quality and coverage. The Applicants also assert that the proposed merger would accelerate the deployment of wireless interactive multimedia services ("WIMS") using the 2.5 GHz band. Finally, the applicants assert that the merger would benefit public safety communications and state that the merged entity will comply with Nextel's obligations under the Commission's 800 MHz rebanding plan.⁵⁵

16. On February 16, 2005, the Wireless Telecommunications Bureau ("Bureau") released a protective order under which third parties were allowed to review confidential or proprietary documents submitted by the Applicants.⁵⁶ On February 28, 2005, the Commission released a Public Notice seeking public comment on the proposed transaction.⁵⁷ In response to the Comment Public Notice, parties filed seven pleadings that were styled petitions to deny the applications and 38 comments during the pleading cycle.⁵⁸

17. Community Technology Centers' Network ("CTC Net"), Consumer Federation of America/Consumers Union ("CFA/CU"), and NY3G Partnership contend that the Commission should deny this license transfer application because the merged entity would hold an excessive amount of BRS/EBS spectrum nationwide and this would result in spectrum warehousing, delays in service launch, and a lack of service and competitive prices.⁵⁹ Duncan, Preferred Communications, and the Safety and Frequency Equity Competition ("SAFE") Coalition argue that further consolidation in the market for mobile telephony voice and data services would exacerbate the alleged competitive harms that the Commission's rebanding plan caused non-Nextel SMR licensees who hold Economic Area ("EA") and site licenses.⁶⁰ In its pleadings, the New Jersey Division of the Ratepayer Advocate contends that

⁵² Attachment, Public Interest Statement at 22-63.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 57-64.

⁵⁶ Applications for the Transfer of Control of Licenses and Authorizations from Nextel Services, Inc. and Its Subsidiaries to Sprint Corporation; Protective Order, 20 FCC Rcd 3607 (2005).

⁵⁷ *Comment Public Notice*, 20 FCC Rcd at 4119. The Comment Public Notice set due dates of March 30, 2005 for Petitions to Deny, April 11, 2005 for Oppositions, and April 18, 2005, for Replies. *See id.* at 4123.

⁵⁸ For the reasons we discuss, *infra*, we find that NY3G Partnership and the New Jersey Division of the Ratepayer Advocate pleadings did not comply with the requirements, under section 309(d)(1) of the Communications Act, for the filing of a petition to deny. We nevertheless address those pleadings in the applicable sections of this Order. *See* Sections V.B.1.a. and V.A.6. The parties that filed formal pleadings in this proceeding are noted in Appendix A. In addition to those formal pleadings, we have received informal comments through *ex parte* submissions. *See* Appendix A. All pleadings and comments are available on the Commission's Electronic Comment Filing System ("ECFS") website at www.fcc.gov/cgb/ecfs/.

⁵⁹ CTC Net Petition to Deny at 7; CFA/CU Petition to Deny at 7; NY3G Partnership Petition to Deny at 3.

⁶⁰ Duncan Petition to Deny at 3; Preferred Communications Petition to Deny at 9; SAFE Coalition Petition to Deny at 5-9.

reduction of the number of nationwide mobile telephony carriers from five to four would reduce the availability of roaming services to rural customers.⁶¹ It also argues that the amount of BRS/EBS spectrum held or leased by the merged entity would create a barrier to entry for others who would want to provide WIMS.⁶²

18. On April 29, 2005, Bureau staff requested additional information from the Applicants ("Information Request").⁶³ The Applicants' responses to the Information Requests are included in the record.⁶⁴ On May 6, 2005, Commission staff requested data from the Applicants and from Nextel Partners, Cingular Wireless Corp. ("Cingular"), Verizon Wireless, LLC ("Verizon Wireless"), T-Mobile, ALLTEL Corporation ("ALLTEL"), Western Wireless Corp., and Southern LINC Wireless.⁶⁵ The responses to the Data Requests are included in the record.

2. Department of Justice Review

19. The Antitrust Division of the U.S. Department of Justice ("DOJ") reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.⁶⁶ The Antitrust Division's review is limited solely to an

⁶¹ Ratepayer Advocate Reply at 3-4.

⁶² *Id.* at 5.

⁶³ Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Larry Krevor, Vice-President, Government Affairs, Nextel Communications, Inc. (April 29, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Vonya McCann, Senior Vice-President, Federal External Affairs, Sprint Corporation (April 29, 2005).

⁶⁴ On May 20, 2005, after considering a joint written request from the Applicants, the Commission released another protective order to provide enhanced protection for a portion of the documents that the applicants believed to contain competitively sensitive business information and should not be shared with in-house counsel. *See Applications for the Transfer of Control of Licenses and Authorizations from Nextel Services, Inc. and Its Subsidiaries to Sprint Corporation; Second Protective Order*, WT Docket No. 05-63, Order (DA 05-423), 20 FCC Rcd __ (2005); 2005 WL 516794. A number of the Applicants responses to the Initial Information Requests were filed subject to this Second Protective Order.

⁶⁵ Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Larry Krevor, Vice-President, Government Affairs, Nextel Communications, Inc. (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Vonya McCann, Senior Vice-President, Federal External Affairs, Sprint Corporation (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Don Manning, Vice-President, Nextel Partners (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to John T. Scott III, Deputy General Counsel, Regulatory Law, Verizon Wireless (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Thomas J. Sugrue, Vice President, Federal Government Affairs, T-Mobile USA, Inc. (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Glenn S. Rabin, Vice President, Federal Communications Counsel, ALLTEL Corporation (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Mark Rubin, Federal Government Affairs, Western Wireless Corporation (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to Michael Rosenthal, Director of Regulatory Affairs, Southern LINC Wireless (May 6, 2005); Letter from Scott D. Delacourt, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission to David G. Richards, Chief Counsel, Federal Regulatory, Cingular Wireless, LLC (May 6, 2005).

⁶⁶ 15 U.S.C. § 18.

examination of the competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. On August 3, 2005, the Antitrust Division closed its investigation of the Sprint-Nextel merger without taking any enforcement action.⁶⁷

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

20. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of Nextel's licenses and authorizations to Sprint will serve the public interest, convenience, and necessity.⁶⁸ In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,⁶⁹ other applicable statutes, and the Commission's rules.⁷⁰ If the transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing process weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.⁷¹ The Applicants bear the burden of proving, by a preponderance of the evidence, that the

⁶⁷ DOJ, *Statement of the Department of Justice Antitrust Division on the Closing of the Investigation of Sprint Corporation's Acquisition of Nextel Communications Inc.* (press release) Aug. 3, 2005.

⁶⁸ 47 U.S.C. §§ 214(a), 310(d).

⁶⁹ Section 310(d), 47 U.S.C. § 310(d), requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21543 ¶ 40 (2004) ("*Cingular-AT&T Wireless Order*"); Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees, *Memorandum Opinion and Order*, 15 FCC Rcd 3341, 3345-46 ¶ 10 (2000) ("*VoiceStream-Omnipoint Order*"); Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 18025, 18030 ¶ 8 (1998) ("*WorldCom-MCI Order*"); *SBC-BellSouth Order*, 15 FCC Rcd at 25464 ¶ 12; Vodafone AirTouch, PLC, and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 16507, 16511-12 ¶ 12 (WTB, IB 2000) ("*Bell Atlantic-Vodafone Order*").

⁷⁰ See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40; Applications for Consent to the Assignment of Licenses Pursuant to section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, *Memorandum Opinion and Order*, 19 FCC Rcd 2570, 2580-81 ¶ 24 (2004) ("*Cingular-NextWave Order*"); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd 473, 484 ¶ 16 (2004) ("*GM-News Corp. Order*"); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar-DirectTV HDO*"); AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications, *Memorandum Opinion and Order*, 14 FCC Rcd 19140, 19150 ¶ 20 (1999) ("*AT&T Corp.-British Telecom. Order*"); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 6232, 6241 ¶ 23 (WTB, MB 2004) ("*Nextel-WorldCom Order*"); Application of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. and TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C., Polycell Communications, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC, *Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3721-22 ¶ 12 (WTB 2000); GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, 14045 ¶ 20, 14046 ¶ 22 (2002) ("*Bell Atlantic-GTE Order*").

⁷¹ See, e.g., *Cingular-NextWave Order*, 19 FCC Rcd at 2580-81 ¶ 24 (2004); *GM-News Corp. Order*, 19 FCC Rcd at 483 ¶ 15; *WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee*, (continued....)

proposed transaction, on balance, serves the public interest.⁷² If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.⁷³

21. Our public interest evaluation encompasses the “broad aims of the Communications Act,”⁷⁴ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest. Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁷⁵ In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.⁷⁶

22. In determining the competitive effects of the merger, our analysis is informed by, but not

(Continued from previous page)

Memorandum Opinion and Order, 18 FCC Rcd 26484, 26492 ¶ 12 (2003) (“*WorldCom Order*”); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002) (“*AT&T-Comcast Order*”); *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20574 ¶ 25; VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9789 ¶ 17 (2001) (“*Deutsche Telekom-VoiceStream Order*”); *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14045 ¶ 20, 14046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd at 3347 ¶ 12; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19150 ¶ 20; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10; *Nextel-WorldCom Order*, 19 FCC Rcd at 6241-42 ¶ 23; *SBC-BellSouth Order*, 15 FCC Rcd at 25464 ¶ 13, 25467 ¶ 18; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd at 16512 ¶ 13, 16517 ¶ 25.

⁷² See, e.g., *Cingular-NextWave Order*, 15 FCC Rcd at 2581 ¶ 24; *GM-News Corp. Order*, 19 FCC Rcd at 483 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd at 3347 ¶ 11; *SBC-BellSouth Order*, 15 FCC Rcd at 25464 ¶ 13; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd at 16512 ¶ 13; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 14 FCC Rcd 3160, 3169 ¶ 15 (1999) (“*AT&T-TCI Order*”); *WorldCom-MCI Order*, 13 FCC Rcd at 18,031-32 ¶ 10.

⁷³ 47 U.S.C. § 309(e). See also *GM-News Corp. Order*, 19 FCC Rcd at 483 n.49; *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14231 ¶ 435; *WorldCom-MCI Order*, 13 FCC Rcd at 18139-40 ¶ 202. Section 309(e)’s requirement applies only to those applications to which Title III of the Act applies, i.e., radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, see *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

⁷⁴ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 41; *GM-News Corp. Order*, 19 FCC Rcd at 483 ¶ 16; *AT&T-Comcast Order*, 17 FCC Rcd at 23255 ¶ 27; *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20575 ¶ 26; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd 9816, 9821 ¶ 11 (2000) (“*AT&T-MediaOne Order*”); *VoiceStream-Omnipoint Order*, 15 FCC Rcd at 3346-47 ¶ 11; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19146 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18030 ¶ 9.

⁷⁵ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 41; *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

⁷⁶ See *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

limited to traditional antitrust principles.⁷⁷ The Commission and DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission's review differ from those of DOJ.⁷⁸ DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce.⁷⁹ The Commission, on the other hand, is charged with determining whether the transfer of licenses serves the broader public interest, as stated above. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.⁸⁰ In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.⁸¹ We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁸²

23. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁸³ These conditions may include the divestiture of certain licenses along with associated facilities and customers, for example. Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of

⁷⁷ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; *GM-News Corp. Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 13. See also *Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

⁷⁸ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; *GM-News Corp. Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd at 3169 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 12.

⁷⁹ 15 U.S.C. § 18.

⁸⁰ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 10.

⁸¹ *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19,150 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd at 23256 ¶ 28.

⁸² *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 42; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Inc. Transferors, to AOL Time Warner Inc., Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6550 ¶ 5, 6553 ¶ 15 (2001) ("*AOL-Time Warner Order*").

⁸³ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19150 ¶ 15. See also *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (conditioning approval on the divestiture of MCI's Internet assets); *Deutsche Telekom-VoiceStream Wireless Order*, 16 FCC Rcd 9779 (2001) (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

the Act.⁸⁴ Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”⁸⁵ Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.⁸⁶ Despite the Commission’s broad authority, we have held that we will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)⁸⁷ and that are fairly related to the Commission’s responsibilities under the Communications Act and related statutes.⁸⁸ Thus, we do not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.

IV. QUALIFICATIONS OF APPLICANTS

24. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”⁸⁹ Therefore, as a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission’s rules.⁹⁰ In making this determination, the Commission does not, as a general rule, re-evaluate the qualifications of transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.⁹¹

25. We find that Sprint and Nextel meet the requisite qualifications. The Commission has previously determined that Sprint and Nextel are qualified to hold licenses.⁹² No parties have raised issues

⁸⁴ 47 U.S.C. § 303(r). See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (citing *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station’s primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

⁸⁵ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19150 ¶ 15.

⁸⁶ See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *GM-News Corp. Order*, 19 FCC Rcd at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14. See also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission’s authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

⁸⁷ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *GM-News Corp. Order*, 19 FCC Rcd at 534 ¶ 131; *AT&T-Comcast Order*, 17 FCC Rcd at 23302 ¶ 140; *AOL-Time Warner Order*, 16 FCC Rcd at 6550 ¶ 5-6.

⁸⁸ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 43; *AOL-Time Warner Order*, 16 FCC Rcd at 6610 ¶¶ 146-47.

⁸⁹ See 47 U.S.C. §§ 308, 310(d); *Cingular-AT&T Wireless Order* 19 FCC Rcd at 21543 ¶ 44; *GM-News Corp. Order*, 19 FCC Rcd at 485 ¶ 18.

⁹⁰ See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see, e.g., *Cingular-AT&T Wireless Order* 19 FCC Rcd at 21543 ¶ 44; *GM-News Corp. Order*, 19 FCC Rcd at 485 ¶ 18; *WorldCom Order*, 18 FCC Rcd at 26493 ¶ 13; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd at 9790 ¶ 19.

⁹¹ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 44; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd at 9790 ¶ 19; *SBC-BellSouth Order*, 15 FCC Rcd at 25465 ¶ 14.

⁹² See Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-In-Possession) to Nextel Spectrum Acquisition Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 6232, 6242 ¶ 26 (2004); Wireless (continued....)

with respect to the basic qualifications of Sprint or Nextel.

V. PUBLIC INTEREST ANALYSIS

26. For purposes of our public interest analysis, this transaction involves most importantly two kinds of spectrum assets: SMR/broadband PCS licenses, and BRS/EBS licenses and leases. And, as the record demonstrates, this transaction at least potentially involves several relevant product markets. These include mobile voice service, mobile data service, dispatch service, and fixed wireless service. Issues of intermodal competition between mobile voice and wireline service arise as well. The overall structure of our analysis, however, is driven by two threshold considerations regarding the BRS/EBS licenses and leases. As further explained below, the availability of the BRS/EBS spectrum for new uses in the near term will be limited because the licenses will need to transition to a new band plan, and thus neither public interest harms nor benefits related to use of this spectrum are likely in the near term. Moreover, it is unclear whether the eventual future use of this spectrum will be to provide mobile service, fixed service, or a combination of the two. Taken together, these considerations mean that any judgments regarding the impact of combining Nextel's and Sprint's BRS/EBS holdings will necessarily be speculative.

27. Therefore, we organize our analysis as follows. First, we address potential harms and benefits of this merger on mobile telephony markets, *excluding* any potential impact of the BRS/EBS licenses. In evaluating the competitive impacts on cellular and broadband PCS, we address both potential harms and benefits of the merger on these markets as affected by the proposed transfer of licenses. This analysis focuses primarily on the horizontal effects to output markets for telecommunication services that business and individuals purchase and consume. We also consider input markets, as the proposed Sprint-Nextel merger affects spectrum licenses, a key input that may influence the overall competitive harms and benefits resulting from the transaction.

28. Next, we turn to a separate analysis of the potential impact of BRS/EBS assets, considering possible relevant markets, harms, and benefits. We note that BRS/EBS spectrum is not considered in the analysis of the mobile telephony market because 2.5 GHz spectrum is committed to non-mobile telephony uses currently and for the near-term future, due to the historical configuration of the band and the multi-year transition process needed to reconfigure the band. In our analysis of BRS/EBS assets, we find that, regardless of whether the efficient future use of the 2.5 GHz spectrum ultimately turns out to be mobile, portable, or fixed service, it is unlikely that this transaction will have a negative impact on competition. We envision that, under any of these scenarios, by the time this spectrum capacity is put to use, sufficient other spectrum should be available so that no undue market power will be conferred on the combined entity. Finally, we address other issues, including certain alleged impacts on wireless/wireline competition, on dispatch service, and on the provision of public safety services.

29. We do not include stand-alone discussions of the possibility of entry in either the mobile telephony or BRS/EBS sections. Rather, the impact of entry is incorporated into our overall analysis as follows. First, in the assessment of possible unilateral effects harm in mobile telephony, we consider the ability of firms already substantially built-out in a market to expand capacity and service. Second, in the assessment of both mobile telephony and the merged entity's expanded control over BRS/EBS spectrum licenses, we consider the entry that will be enabled by the 90 megahertz of bandwidth available in the Advanced Wireless Service ("AWS") auction, planned to commence in June 2006. We do not rely on any other planned auctions of spectrum licenses to enable entry, because their timing is more uncertain,

(Continued from previous page)

Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications, Report No. 1729 (Jan. 28, 2004) (consenting to the assignment of call sign WPZU405 (formerly KNLF206) to Wireless Co. L.P., a wholly owned subsidiary of Sprint).

they are too far in the future, or they involve encumbered spectrum. Moreover, we do not rely at all on entry by firms entirely new to the markets at issue here to ameliorate any anticompetitive harms.

A. Mobile Telephony Competition

30. In this section, we evaluate the proposed transfer of CMRS licenses and analyze the competitive implications to mobile telephony competition. A merger between Sprint and Nextel would combine two of the five remaining national mobile telephony carriers. As we do generally with horizontal mergers, we consider whether this merger would reduce the availability of consumer choices to the point that Sprint Nextel would have the incentive and ability, either by itself or in coordination with other firms, to raise prices for mobile telephony services or otherwise behave anticompetitively.⁹³ The ability to raise prices above competitive levels is generally referred to as “market power.” Market power may also enable sellers to decrease service quality or future innovation.⁹⁴ A fundamental tenet of the Commission’s public interest review is that, absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest.⁹⁵

31. A horizontal transaction is unlikely to create or enhance market power or facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured.⁹⁶ Transactions that do not significantly increase concentration or result in a concentrated market ordinarily require no further competitive analysis. Market concentration is generally measured by the Herfindahl-Hirschman Index (“HHI”) and changes in concentration are measured by the change in the HHI. However, HHI data provide only the beginning of the analysis. The Commission then examines other market factors that pertain to competitive effects, including the incentive and ability of other firms to react and of new firms to enter the market. Ultimately, the Commission must assess whether it is likely that the merged firm could exercise market power in any particular market.⁹⁷

32. We begin by determining the appropriate market definitions to employ for the analysis, and by identifying relevant market participants. We then measure the degree of market concentration. Next we consider the possible competitive harms that could occur due to a significant increase in market concentration or market power. Mergers can diminish competition and firms can exercise market power in a number of ways. A merger may create market power in a single firm and allow that firm to act on its own in raising prices, lowering quality, reducing innovation, or restricting the deployment of new technologies or services. These are generally referred to as unilateral effects. Such may occur, for example, where the other firms in the market lack the capacity to serve the customers who would otherwise leave the merged firm due to a price increase. In differentiated product markets, a merger – by eliminating a competitor with a similar product – may allow the merged firm unilaterally to raise prices or

⁹³ See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd. 15756, 15802-03 ¶ 83 (1997) (“*LEC Classification Order*”); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations, *Fourth Report and Order*, 95 FCC 2d 554, 558 ¶ 7-8 (1983) (“*Competitive Carrier Fourth Report and Order*”), vacated on other grounds, *AT&T v. FCC*, F.2d 727 (D.C. Cir. 1992), cert. denied, *MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); *DOJ/FTC Merger Guidelines* § 0.1.

⁹⁴ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68; *DOJ/FTC Merger Guidelines* § 0.1, n.6.

⁹⁵ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68.

⁹⁶ *Id.* at 21556 ¶ 69; *DOJ/FTC Merger Guidelines* § 1.0.

⁹⁷ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 69.

lower quality profitably because it will no longer lose customers to its merged partner. A merger may also make coordinated actions that harm consumers by the firms selling in the market more likely, more successful, or more complete. This behavior includes tacit or express collusion and *may or may not* be lawful in and of itself. Such coordination requires reaching an agreement, then detecting and punishing departures from the agreement. The effects of such coordinated behavior may include increased prices, reduced number of minutes in a given price plan, degraded output quality, or some combination of these effects. They may also include longer-term effects such as reduced innovation and restricted deployment of new technologies and services.⁹⁸ After examining the transaction's potential effects on competition, we examine other potential public interest harms and the potential public interest benefits claimed by the Applicants.

33. In the analysis that follows, we focus our discussion on only those elements and considerations that are at issue in the instant merger. We note that in analyzing possible competitive harm from the transaction, we treat the Sprint and Nextel affiliates as if they are a part of the merged entity, while in analyzing the possible benefits, we exclude the affiliates. This conservative approach ensures that we neither overlook possible harms (e.g., a reduction in competition where one of the merger partner's operations overlaps with an affiliate of the other partner), nor overstate potential public benefits (the Applicants' plans for network integration and service improvements do not, at this time, extend to the operations of any of the Sprint or Nextel affiliates).

34. The results of the first step in our analysis of mobile telephony competition are consistent with past findings in horizontal mergers between CMRS licensees. As explained below, we determine that the appropriate product market definition to employ for the analysis is the combined market for mobile telephony services. We analyze all of the separate markets, e.g., interconnected mobile voice services and mobile data services, under this combined product market. We also examine the relevant geographic market for analyzing the competitive effects of this transaction and find that the relevant market is local in nature and that all the facilities-based cellular, PCS, and SMR licensees that provide mobile telephony services in a geographic area are the relevant market participants.

35. The second step is a specific analysis of the horizontal and vertical effects in certain markets that result in potential competitive harms. To determine potential horizontal effects, we first measure the degree of market concentration through an initial Herfindahl-Hirschman Index ("HHI") screen that eliminates from further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace.⁹⁹ We then examine two horizontal issues for the 124 Component Economic Areas ("CEAs") and 190 Cellular Market Areas ("CMAs")¹⁰⁰ identified by our

⁹⁸ *Id.* at 21557 ¶ 70.

⁹⁹ The HHI is the sum of the squares of the market shares of each firm participating in the market. The HHI can range from nearly zero in an atomistic market to 10,000 in the case of monopoly. Since the HHI is based on squared market shares, it gives proportionally greater weight to carrier with large market shares. See Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, at § 1.5 (Apr. 2, 1992, revised Apr. 8, 1997) ("DOJ/FTC Merger Guidelines"); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21564 n.306.

¹⁰⁰ The CMAs identified by the screen overlap to a very large extent with the CEAs identified. *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21564 ¶ 104. CEAs, which are defined by the Bureau of Economic Analysis, are composed of a single economic node and surrounding counties that are economically related to the node. There are 348 CEAs in the 50 States and the District of Columbia. Of the 3,141 U.S. counties, 2,267 are non-nodal counties assigned to a CEA based first on county-to-county commuting flows from the 1990 Census and second on locations of the most widely read regional newspapers. Three quarters of non-nodal counties were assigned based on commuting patterns. See Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURVEY OF CURRENT BUSINESS, Feb. 1995, at 75-81. In November 2004, the Bureau of Economic Analysis updated definitions for CEAs. The total number of CEAs decreased from 348 to 344. Non-nodal county assignment continued to be based on (continued....)

screen for further competitive review: coordinated interaction and unilateral effects. Based on our analysis of conditions that typically exist in local U.S. markets, we find that the merger of Sprint and Nextel would be unlikely to facilitate coordinated interaction in the mobile telephony market. In addition, we find that this merger would be unlikely to result in adverse unilateral effects in the markets identified by the initial screen based on our analysis of market shares, number of competitors in the local market, probable competitive responses by rivals, and issues of product differentiation, substitutability, and efficiencies. Although the Applicants identified seven BTAs¹⁰¹ where, on first inspection, competitors may lack sufficient capacity to be able to respond adequately to potential anticompetitive unilateral actions taken by the merged entity, based on a more granular analysis of local markets set forth in a confidential Appendix, we determine that harms in these few markets are unlikely. Finally, we also consider the potential vertical harms of the proposed transaction on the CMRS roaming market and separately conclude that the merger will not adversely affect competition in the market for roaming services or raise rates that would be passed through to consumers.

36. The last step in our review is to apply several criteria to decide whether purported public interest benefits should be considered and weighed against potential harms from the merger. Under our analysis, we determine that the Applicants' proposed transaction will likely result in some merger-specific public interest benefits. We explain below how certain post-merger efficiencies may result in specific cost savings that yield reduced prices for consumers, better coverage and service quality, and more extensive service offerings.

I. Market Definition

37. In this section, we determine the appropriate definitions for the product markets, the geographic markets, and the market participants. Our determinations with respect to the market definitions are generally consistent with the *Cingular-AT&T Wireless Order*, with discussions added here on retail and wholesale markets and on PTT. We adopt the definition of "mobile telephony services" used by Applicants, which is based on the *Cingular-AT&T Wireless Order*. In turn, we use these findings to frame our competitive analysis of the proposed merger.

a. Product Market Definition

38. As explained below, we find that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services. Nevertheless, we analyze all of these product markets under the combined market for mobile telephony. We believe, based upon consideration of factors including the nature of these services and their relationship with each other, that this approach will provide a reasonable assessment of any potential competitive harm to any of the markets as a result of the transaction. Further, we need not
(Continued from previous page)

county-to-county commuting flows and locations of the most widely read regional newspapers. See Kenneth P. Johnson & John R. Kort, *2004 Redefinition of the BEA Economic Areas*, SURVEY OF CURRENT BUSINESS, Nov. 2004, at 68-71. For purposes of this transaction, we did not adopt the new CEA definitions. CMAs are the regions originally used by the Commission in issuing licenses for cellular service. There are 734 CMAs, made up of 305 Metropolitan Statistical Areas ("MSAs"), 428 Rural Service Areas ("RSAs"), and a market for the Gulf of Mexico. See *Ninth Competition Report*, 19 FCC Rcd at 20632 ¶ 87. RSAs are regions defined by the Commission for the purpose of issuing spectrum licenses. See *Ninth Competition Report*, 19 FCC Rcd at 20632 ¶ 87.

¹⁰¹ [REDACTED] In this Order, "REDACTED" indicates confidential or proprietary information subject to the Protective Order in this proceeding. Applications for the Transfer of Control of Licenses and Authorizations from Nextel Services, Inc. and Its Subsidiaries to Sprint Corporation; *Protective Order*, 20 FCC Rcd 3607 (2005). The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective order. Qualified persons who have not yet signed the required acknowledgment may do so in order to obtain the confidential version of this Order.

determine if dispatch and PTT are separate product markets. Dispatch is not affected by this merger. While PTT is affected, our conclusions about the impact of the transaction on PTT do not depend on whether it is treated as a separate product market or feature.

39. A relevant market includes “all products ‘that consumers consider reasonably interchangeable for the same purposes.’”¹⁰² Thus, when one product is considered by consumers to be a reasonable substitute for another product, it is included in the relevant market.¹⁰³ A relevant product market is defined in the economic literature as the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a “small but significant and non-transitory price increase,” presuming no change in the terms of sale of other products (the “hypothetical monopolist test”).¹⁰⁴

40. To determine the relevant product markets for the purposes of evaluating the transaction, we first assume that a hypothetical monopolist within a geographic area offers one of the differentiated mobile telephony products such as stand-alone data services or a regional rate plan. Then we assume that this monopolist imposes a small but significant and non-transitory price increase for this mobile telephony service, and finally we evaluate the likely response of consumers to this price increase. If the price increase would allow the monopolist to make greater profits over a sustained period than before the price increase, even though some consumers will switch to other products, then this product may be defined as a relevant product market.¹⁰⁵

41. In their Application, Sprint and Nextel state that they have followed the *Cingular-AT&T Wireless* definition of “mobile telephony services” to define the product market.¹⁰⁶ In that Order, the Commission found that separate markets exist for interconnected mobile voice and mobile data services, and also for residential and enterprise services.¹⁰⁷ However, in performing its analysis, the Commission decided that analyzing the proceeding using a combined market for mobile telephony was unlikely to understate any potential competitive harm, and thus analyzed all of these services under such a combined market.¹⁰⁸

¹⁰² *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); see also *United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001) (discussing non-interchangeability among products); *Wireless Telephone Services Antitrust Litigation*, No. 02 Civ. 2637(DLC), 2003 WL 21912603 at 9 (S.D.N.Y. Aug. 12, 2003) (relevant product market “consists of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered”).

¹⁰³ The Commission has considered whether one product is a reasonable substitute for another product. See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21557 ¶ 71; Applications of Western Wireless Corp. and ALLTEL Corp., WT Docket No. 05-50, *Memorandum Opinion and Order*, FCC 05-138, 2005 WL 1693557, ¶¶ 60-64 (rel. July 19, 2005) (“*ALLTEL-Western Wireless Order*”).

¹⁰⁴ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21557 ¶ 71 & n.259 (citing DOJ/FTC Merger Guidelines §§ 1.11, 1.12 and Gregory Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003)).

¹⁰⁵ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 73; DOJ/FTC Merger Guidelines §§ 1.11.

¹⁰⁶ Application, Public Interest Statement at 68.

¹⁰⁷ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

¹⁰⁸ See *id.* at 21588, 21559-60, 21560 ¶¶ 74, 77, 79.

(i) Mobile Voice and Mobile Data Services

42. Although we find that there are separate markets for interconnected mobile voice¹⁰⁹ and mobile data services,¹¹⁰ our competitive analysis will not distinguish mobile voice subscribers from mobile data subscribers. Instead of a separate analysis of the market for each of these services, we will analyze both of them under the combined market for mobile telephony. This decision is consistent with our determination in the *Cingular-AT&T Wireless Order* and in the *ALLTEL-Western Wireless Order*.¹¹¹ For reasons outlined here, we believe that an analysis based on the combined mobile telephony market will provide a reasonable assessment of any potential competitive harm to the markets for mobile voice or data services due to the transaction. First, we continue to believe, consistent with the *Cingular-AT&T Wireless Order*, that most mobile data services likely are sold as add-ons to mobile voice services rather than as separate data-only service offerings.¹¹² Therefore, we believe that nearly all mobile data subscribers are also mobile voice subscribers using the same phone number. Second, a variety of these mobile data add-ons are offered by all nationwide mobile carriers and some smaller regional carriers.¹¹³ Third, while Sprint continues to be the market leader in mobile data services as measured by the contribution of data to revenue, Nextel provides a lesser level of mobile data services by this same measure. In particular, in the first quarter of 2005 data accounted for 9.8 percent of Sprint's Average Revenue Per Unit ("ARPU"), followed by T-Mobile (7.6 percent), Cingular (7.5 percent), Verizon Wireless (6.3 percent), and Nextel (4.5 percent).¹¹⁴ Fourth, even in these circumstances where Sprint's data revenues exceed Nextel's data revenues, revenues derived from mobile data service provide only a relatively small percentage of nationwide carriers' revenues, despite signs of expansion in these services. As demonstrated immediately above, none of the five carriers listed (Sprint, T-Mobile, Cingular, Verizon Wireless, and Nextel) have data revenues as a percent of ARPU in excess of 10 percent.¹¹⁵ As reflected by these revenue levels, mobile voice service accounts for a larger part of carriers' ARPU than mobile data services. Under these circumstances, if competition is reduced in the mobile voice market as a result of this transaction, then we believe that there also would be a reduction in competition in the mobile data

¹⁰⁹ Interconnected mobile voice consists of all commercially available two-way mobile voice services, providing access to the public switched telephone network via mobile communications devices employing radiowave technology to transmit calls. See *Ninth Competition Report*, 19 FCC Rcd at 20611-12 ¶ 32.

¹¹⁰ Mobile data service is considered to be the delivery of non-voice information to a mobile device. Two-way mobile data services include the ability not only to receive non-voice information on an end-user device, but also to send it from an end-user device to another mobile or landline device using wireless technology. Data services available today include, but are not limited to, short messaging service, e-mail, and access to the Internet. See *Ninth Competition Report*, 19 FCC Rcd at 20612 ¶ 33.

¹¹¹ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74; *ALLTEL-Western Wireless Order*, 2005 WL 1693557, ¶¶ 25-31.

¹¹² See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 75.

¹¹³ See *Ninth Competition Report*, 19 FCC Rcd at 20659 ¶ 153 (citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eighth Report*, 18 FCC Rcd 14783, 14846-14855 ¶¶ 143-166 (2003) ("*Eighth Competition Report*").

¹¹⁴ Simon Flannery et al., *1Q05 Trend Tracker: The Telecom Conundrum*, Morgan Stanley, Equity Research, June 8, 2005, at 25 ("*1Q05 Trend Tracker: The Telecom Conundrum*"). See also Daniel Henriques et al., *The Quarter in Pictures, 1Q05 U.S. Telecom Services Review*, Goldman Sachs, Global Investment Research, May 2005, at 24 ("*The Quarter in Pictures, 1Q05 U.S. Telecom Services Review*"); John Byrne et al., *Wireless Telecom Investor*, Kagan Research, LLC, June 6, 2005, at 5 ("*Wireless Telecom Investor*").

¹¹⁵ *1Q05 Trend Tracker: The Telecom Conundrum* at 25. See also *The Quarter in Pictures, 1Q05 U.S. Telecom Services Review* at 24; *Wireless Telecom Investor* at 5.

market primarily because of mobile data service's current standing as an add-on to mobile voice service. In turn, if the transaction does not harm competition in the mobile voice market, then we find it unlikely that the transaction would harm competition in the mobile data market because of the relatively low levels of ARPU discussed above that are attributable to data services, the general availability of data services from carriers, and the nature of data offerings as add-ons to mobile voice service. Accordingly, we believe that a combined analysis that includes both mobile voice and mobile data services will not fail to identify any potential competitive harm to the mobile voice or data services markets.¹¹⁶

(ii) **Residential and Enterprise Services**

43. Similarly, although we find that there are separate relevant product markets for residential and enterprise services, we will aggregate those markets for purposes of our structural analysis. We find that this determination is consistent with the *Cingular-AT&T Wireless Order*.¹¹⁷ Because most mobile telephony service subscribers are residential customers,¹¹⁸ an analysis based on subscriber shares for a combined mobile telephony services market will tend to provide more accurate insights into the residential market. Moreover, analyzing a combined residential and enterprise product market should provide a fair assessment of the potential competitive harm to the enterprise service market because the competition to attract and retain enterprise customers, who typically generate higher revenue per subscriber for carriers than residential customers,¹¹⁹ is likely to be relatively intense.¹²⁰ Under these circumstances, we believe that our analysis of a combined residential and enterprise product market should provide a fair assessment of potential competitive harm.¹²¹

¹¹⁶ We find that our reasoning here does not conflict with the *Cingular-AT&T Wireless Order* where the Commission addressed Sprint's role in the mobile data services market relative to the mobile voice services market. See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558-60 ¶¶ 75-77. Indeed, that decision recognized Sprint's position in the mobile data market, and a major reason for the proposed Sprint Nextel transaction is the potential for improved access by Nextel's customers to data services.

¹¹⁷ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558, 21560 ¶¶ 74, 79.

¹¹⁸ One analyst estimated that, in 2004, only 25 percent of wireless users were business customers, with the remaining 75 percent being consumers. *10-Year Wireless Projections*, KAGAN WIRELESS TELECOM INVESTOR, June 6, 2005, at 2. [REDACTED]

¹¹⁹ IDC recently projected U.S. consumer wireless ARPU to increase to \$48 in 2009, and U.S. business wireless ARPU to increase to \$74 in 2009. Press Release, IDC, "IDC Forecasts Both U.S. Consumer and Business Wireless Subscriber ARPU to Trend Upward Through 2009," (April 14, 2005) at <http://www.idc.com/getdoc.jsp?containerId=prUS00125505> (last visited July 28, 2005). See also Ric Prentiss, et al., *Nextel Communications, Inc.: Initiation of Coverage*, RAYMOND JAMES, EQUITY RESEARCH, Feb. 9, 2004, at 6 (stating that business customers generally spend more than consumers) ("*Nextel: Initiation of Coverage*"); *Wireless Services, Characteristics of Wireless Subscribers and Non-Users*, BEAR STEARNS, EQUITY RESEARCH, Feb. 2005, at 6, Ex. 9 (comparison of "Average Monthly Expenditure Across Motivations for Adopting Wireless" shows highest expenditure is for business purposes); [REDACTED]

¹²⁰ See, e.g., Application, Attachment B, Charles River Associates Analysis ("CRA Analysis") at 49 ¶ 133 (stating that "high degree of competition for enterprise customers" constrains certain prices); [REDACTED] Holly Wade, *Telecommunications*, NAT'L SMALL BUSINESS POLL, Issue 8, at 6 (2004) (discussing competition among cell phone service providers; fifty-four percent of owners of small businesses polled believed there was more competition for their business among cell phone providers at time of poll than three years before; on average small business owners were aware of 5 cell phone service providers in their area).

¹²¹ In addition, we note that Nextel's focus has been on business customers whereas Sprint's focus has traditionally been on consumers. See CRA Analysis at 33-34 ¶ 88 (Nextel's focus more toward business, while Sprint's offerings are designed to appeal toward non-enterprise customers); *Nextel Initiation of Coverage* at 14 ("Nextel's main focus is business customers, which represent approximately 70 percent of the total customer base."); (continued....)

(iii) Nationwide and Local/Regional Services

44. We also do not define separate product markets for nationwide and local/regional carrier calling plans. Rather, in our analysis below we take account of the fact that local/regional plans are differentiated from nationwide plans, and thus firms that can only provide local/regional plans may not have the same competitive role as firms offering nationwide service plans.

(iv) Retail and Wholesale Markets

45. In addition, we will not treat retail and wholesale as separate markets for purposes of analyzing the transaction, although we will take account of the role of resellers in our discussion of likely competitive effects. Resellers offer service to consumers by purchasing airtime at wholesale rates from facilities-based providers and reselling it at retail prices. However, the resale sector accounts for only approximately nine percent of all mobile telephone subscribers.¹²² Applicants contend that Sprint, Cingular, and Verizon Wireless together supply access for approximately 95 percent of all subscribers who are served through a wholesale entity, and that there is vigorous competition among these carriers. Applicants further state that such competition, together with Nextel not supplying wholesale services, indicates that the proposed Sprint Nextel merger will not harm competition among existing suppliers of wholesale services.¹²³ Applicants also state that other carriers generally have sufficient capacity to absorb both Sprint Nextel retail customers who would want to switch carriers in response to any possible post-merger price increase, as well as the customers that Sprint currently serves through its wholesale arrangements.¹²⁴ We agree with these assertions by the Applicants, and we find that the proposed merger would not likely harm competition among existing suppliers of wholesale services.¹²⁵ Accordingly, we do not examine separate retail and wholesale markets in our competitive analysis.

(v) Push-To-Talk (PTT)

46. As we explain below, we find it is not necessary, for the purposes of this order, to decide whether dispatch is a separate market from CMRS or the related issue of whether PTT is a "feature" or a "product." We note that a variety of PTT and dispatch services are available to customers. PTT is a "walkie-talkie" type of 2-way radio-type service that allows communication between parties at the touch of a button. PTT permits users to begin talking to one another instantaneously, subject to differences in latency or set-up periods between various carriers, rather than going through the call-setup process normally associated with mobile voice service (e.g., locating and dialing a number of another party).¹²⁶ As discussed below, PTT generally is bundled as a feature with other services such as mobile voice and mobile data on the handset and is usually available through the public switched telephone network. "Dispatch" is commonly understood to refer to service that allows two-way, real-time, push-to-talk voice

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[REDACTED] Therefore, it is unlikely that the combined Sprint Nextel will gain a disproportionate share of either residential customers or enterprise customers as a result of the merger. This in turn implies that an analysis based on Sprint Nextel's share of mobile telephony subscribers would not miss any potential competitive harms to both the residential market and the enterprise market as a result of the transaction.

¹²² *Local Telephone Competition: Status as of December 31, 2004*, Federal Communications Commission, July 2005, Table 13: Mobile Wireless Telephone Subscribers.

¹²³ CRA Analysis at 19-20 ¶¶ 49-54.

¹²⁴ *Id.* at 20 ¶ 52.

¹²⁵ *See id.* at 19-20 ¶ 51-52.

¹²⁶ *See, e.g.,* Commerce Times, "Push-to-Talk Might Evolve as Standard Cellular Feature," [ecommercetimes.com at http://www.technewsworld.com/story/43225.html](http://www.technewsworld.com/story/43225.html) (visited July 13, 2005).

communications between mobile units and fixed units, or between two or more mobile units.¹²⁷ Dispatch differs from mobile voice communications because it is generally not interconnected with the public switched telephone network ("PSTN") and allows instant, real-time conferencing with groups, including both one-to-many and many-to-one communications.¹²⁸ Dispatch has been described as "neither an industry nor a distinct technology," but rather as an application that can be provided by different technologies.¹²⁹ The term "trunked" refers to dispatch which allows sharing of multiple radio channels. Dispatch service may be bundled with other offerings such as mobile voice or mobile data services.¹³⁰

47. We do not need to address whether unbundled dispatch should be analyzed as a separate relevant product market for this transaction.¹³¹ Sprint does not offer a stand alone PTT service that would be similar to that of unbundled dispatch service, and thus is not a competitor in any such market.¹³² In this regard, SAFE Coalition states that the "unbundled dispatch services offered by smaller, independent, regional SMR providers is a differentiated service, generally distinct from mobile telephony services offered by PCS and cellular carriers such as ... Sprint PCS ("Ready Link®")... all of whom do not generally offer unbundled dispatch service (or close substitutes)" with capabilities offered by SMR dispatch service providers.¹³³ Moreover, any lack of available offerings by nationwide carriers of unbundled dispatch suggests that it currently may not be economical for them to offer such service, and that we need not consider the impact of the transaction on unbundled dispatch. In addition, we do not agree with SAFE Coalition's suggestion that discussions in CMRS competition reports regarding various services, including the use of SMR spectrum for the provision of dispatch, controls our finding with respect to the product market to be considered for this transaction.¹³⁴ Indeed, the discussion of dispatch in past CMRS competition reports addresses the evolving nature of the services offered by carriers and the role of dispatch,¹³⁵ and some of the reports make clear that certain matters considered therein should not

¹²⁷ Applications of Motorola Inc., *Order*, 16 FCC Rcd 8451, 8457 ¶ 13 (WTB) *recon. denied*, 16 FCC Rcd 15235 (WTB 2001) ("Motorola").

¹²⁸ *Id.* See also *Ninth Competition Report*, 19 FCC Rcd at 20633-34 ¶¶ 89. See also; 47 C.F.R. § 22.99 (defining dispatch for purposes of Part 22 as certain communications that are "transmitted directly through a base station, without passing through mobile telephone switching facilities.").

¹²⁹ *Motorola*, 16 FCC Rcd at 8457 ¶ 13.

¹³⁰ In contrast, unbundled offerings may be made, for instance, by small, independent, regional providers of unbundled dispatch. See SAFE Petition to Deny at 5.

¹³¹ The Safety and Frequency Equity Competition Coalition ("SAFE") alleges that Applicant's proposed license assignments do not adequately address the recognition of SMR dispatch as a differentiated service. See SAFE Petition to Deny at 5; SAFE Reply to Joint Opposition at iii, 4-6. SouthernLINC Wireless raises issues concerning the impact of the proposed merger on roaming, and avers that the merger involves a distinct customer segment of interconnected voice and PTT digital dispatch services on the iDEN network. SouthernLINC Wireless Comments at 4.

¹³² Also, as discussed below, we find that Sprint does not currently offer a PTT service that is a close enough substitute for Nextel's offering that this proposed merger would increase the probability of adverse unilateral harm to consumers interested in PTT. See *infra* Section V.A.4.b.

¹³³ SAFE Coalition Petition to Deny at 6.

¹³⁴ See SAFE Reply to Joint Opposition at 4-8.

¹³⁵ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, 16 FCC Rcd 13350, 13353 (2001) ("*Sixth Competition Report*") (noting recognition of increasing convergence of services provided by dispatch and other mobile telephony services); *Ninth Competition Report*, 19 FCC Rcd at 20634 ¶ 89 (discussing development of dispatch functionality by carriers).

be construed as controlling in other contexts.¹³⁶ As a result of these factors, even if we were to define unbundled dispatch service as a separate product market, that market would not be affected by this merger. Accordingly, we reject SAFE Coalition's arguments.

48. In contrast to dispatch, PTT is affected by this merger. Nextel provides digital wireless services including a walkie-talkie function that allows Nextel customers to communicate "one-to-one or one-to-many instantly with the push of a button."¹³⁷ Some cellular and broadband PCS carriers, including Sprint, also offer PTT functionality.¹³⁸ Sprint offers PTT as an add-on feature to its basic interconnected mobile voice service,¹³⁹ and does not offer any other types of PTT or dispatch services. In these circumstances, we find that the overlapping PTT service offered by both Nextel and Sprint is bundled interconnected mobile voice and PTT, and is included in our analysis below.

49. We find that our conclusions will not be affected by whether we treat PTT as a separate product or a feature. It appears that basic interconnected mobile voice offerings may be in a position to substitute more closely for PTT services than they have in the past. For example, carriers generally offer some type of free mobile-to-mobile, or "in-network," calling which requires no additional fees for incoming or outbound calls between subscribers of the company.¹⁴⁰ Since one of the advantages of such mobile-to-mobile or "in-network" services is that they offer unlimited calls within a group of users, unlimited in-network calling may allow basic voice service to substitute for dispatch for a number of customers.

50. In conclusion, treating PTT as a feature or a product does not change the results of our competitive analysis. As explained below,¹⁴¹ the users of PTT will not be harmed as a result of the transaction.

b. Geographic Market Definition

51. We find that the relevant geographic market for analyzing the competitive effect of this transaction on mobile telephony is local. This finding is primarily rooted in the premise that consumers obtain their wireless service in a local area, not on a national basis.

52. The Supreme Court has defined a relevant geographic market as the area in which consumers can reasonably search for competing services.¹⁴² It is commonly defined in the economic literature as the geographic area in which a hypothetical monopolist could profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the

¹³⁶ See, e.g., *Sixth Competition Report*, 16 FCC Rcd at 13353 n.11; *Ninth Competition Report*, 19 FCC Rcd at 20608 n.32.

¹³⁷ Valente and West Decl. at 2 ¶ 2; Application, Public Interest Statement at 24 (Direct Connect "enables customers to quickly establish private, one-to-one conferences nationwide or within a group, or local one-to-many conferences.").

¹³⁸ See *Ninth Competition Report*, 19 FCC Rcd at 20634 ¶ 89.

¹³⁹ See Sprint Voice Features at <http://www.sprint.com/business/products/categories/voiceFeatures.jsp> (last visited July 27, 2005) ("Sprint Voice Features website"). See also Valente and West Decl., Attachment 1 at 3 ¶ 7.

¹⁴⁰ See *Ninth Competition Report*, 19 FCC Rcd at 20644-45 ¶ 114 (discussing pricing plans of various firms, including Verizon Wireless, Cingular, and Sprint).

¹⁴¹ See *infra* Section V.A.4.

¹⁴² *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); accord *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963).

prices of all products provided elsewhere do not change.¹⁴³

53. For the purposes of evaluating this transaction, we use the hypothetical monopolist test to determine the relevant market by asking what is the smallest geographic area in which a hypothetical monopolist could profitably and permanently impose a small but significant price increase. In asking this question, we assume that buyers of wireless services would respond to a price increase by switching to wireless services purchased in a different location rather than, by switching to different wireless services.

54. We note two salient features about the purchase and sale of mobile telephony service. First, carriers base their monthly rates on the purchaser's billing address or zip code. Thus, traveling to a different store, or a different town, or purchasing service over the Internet, will not provide a purchaser with a different monthly rate. In that respect, the geographic market is extremely local, perhaps as small as a zip code or even smaller. On the other hand, it is also true that for national plans, many of the carriers offer the same monthly rate throughout the country, and for regional plans offer the same plan and rate throughout a large region. Thus, we could conclude that for regional plans, the geographic markets are large regions, for example, metropolitan areas or larger portions of states, and for national plans are as large as multi-state regions.¹⁴⁴

55. The second salient feature is that while monthly rates are on the one hand attached to a subscriber's billing address but in practice do not differ across large regions, promotions and handset prices are not attached to a billing address and do vary across a region. Indeed, they may vary even within a town because of the presence of authorized independent dealers. Thus, although a purchaser may not be able to obtain a different monthly rate by traveling to a different location, he or she could obtain a different price for the handset or a different promotion. Finally, we note one additional and important point: most purchasers of mobile telephony service prefer a local telephone number,¹⁴⁵ and stores and carriers offer only local telephone numbers. Thus, the distance most users would be willing to travel to obtain wireless service may well be limited by the geographic boundaries of the local non-toll calling area.

56. For the proposed transaction, the geographic market is the area within which a consumer is most likely to shop for mobile telephony service. For most individuals, we believe this will be a local area, as opposed to a larger regional or nationwide area. In most parts of the United States, partially for the reasons set forth above, we find that the areas within which consumers regularly shop for wireless services are larger than counties, may encompass multiple counties and, depending on an individual's location, may even include parts of more than one state. We reject the argument that the market is as small as a county. If a hypothetical monopolist were to impose a small, non-transitory price increase for mobile telephony services (including promotions and handset prices) within a single county, we find that it would likely be unprofitable because significant numbers of consumers would be able to circumvent the

¹⁴³ The relevant geographic market selected for analysis must also reflect "the commercial realities of the industry." See *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1421 (6th Cir. 1991) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962)); *RSR Corp. v. FTC*, 602 F.2d 1317, 1323 (9th Cir. 1979) (same).

¹⁴⁴ Although carriers currently set uniform prices for monthly service across large regions or the entire country, nothing prevents them from doing otherwise. Without evidence regarding constraints on the carriers' ability to set different prices, for example, the cost of advertising, we would not rely on their current practices to define a geographic market so broadly.

¹⁴⁵ By local number, we mean one for which a user does not incur a toll-charge for calling from a given location. Although, a non-local telephone number does not affect the cost of wireless service of the wireless subscriber, because most carriers offer long-distance service at no additional charge, having a non-local number does affect the cost of landline users calling that subscriber.

higher price by obtaining a reasonably comparable service at a lower price in a nearby county.¹⁴⁶

57. We also do not agree with Preferred Communications¹⁴⁷ that the relevant geographic market should be defined as an Economic Area ("EA"), of which there are 172 in the United States. Consistent with the Commission's decision in the *Cingular-AT&T Wireless Order*, we continue to define the relevant geographic market as local, and analyze the data on the basis of 348 CEAs and 734 CMAs.¹⁴⁸ We believe that CEAs and CMAs represent more appropriate geographic markets than do EAs because they better reflect the local nature of the markets. We believe that these smaller geographic areas provide a better approximation of the areas in which consumers base their decisions to purchase wireless services. Thus we continue to believe that a combination of analyses by CEA and by CMA will provide us with the best estimates of potential competitive harm, and decline to perform competitive analysis on the basis of EAs.

c. Market Participants

58. We find that mobile telephony offered by cellular, PCS, and SMR licensees employing various technologies provide the same basic voice and data functionality and are indistinguishable to the consumer. Generally, we limit our analysis to cellular, PCS, and SMR facilities-based carriers, and exclude satellite carriers, wireless VoIP providers, MVNOs and resellers¹⁴⁹ from consideration when computing initial measures of market concentration. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is significantly higher than for services offered by cellular, PCS or SMR carriers.¹⁵⁰ Therefore, most consumers would not view satellite phones as substitutes for mobile telephony. We also do not consider wireless VoIP carriers as providing the same functionality as mobile telephony providers because in general the service they provide is nomadic rather than mobile.¹⁵¹ We acknowledge, however, that non-facilities based service options such as MVNOs and resellers have an impact in the marketplace and in some instances may provide additional constraints against anticompetitive behavior. We take account of the role of MVNOs and resellers in our discussion of likely competitive effects below.

59. We conclude that all the facilities-based cellular, PCS, and SMR carriers that provide service in a geographic area constitute the relevant market participants. In our analysis, we consider both

¹⁴⁶ We assume that, although the hypothetical monopolist is the only seller of service in the county, customers can still receive service in the county if they purchase their service elsewhere, because there are other carriers who serve the county but do not have stores there, or because other carriers have roaming agreements with the hypothetical monopolist at prices that are not passed on to the customer, or because the customer can purchase service from the hypothetical monopolist itself in a different county at a lower price. As to the last point, we note that wireless carriers do not charge their customers different prices for service on different portions of their own network.

¹⁴⁷ See Preferred Communications Petition to Deny at 8.

¹⁴⁸ See *infra* Section V.A.2.

¹⁴⁹ Today, resellers are often referred to as MVNOs. MVNOs are distinguished from "traditional" resellers by a variety of factors including brand appeal, distribution channels, bundling wireless and non-wireless products, and value added services. See *Ninth Competition Report*, 19 FCC Rcd at 20614 n.71. We have declined to find that a separate product market exists for resell/wholesale services. The resale sector accounts for approximately 9 percent of all mobile telephony subscribers. *Local Telephone Competition: Status as of December 31, 2004*, Federal Communications Commission, July 2005, Table 13: Mobile Wireless Telephone Subscribers.

¹⁵⁰ See Global Com, Iridium Satellite Phone Service Plans, at http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html (last visited July 27, 2005); GlobalStar, Airtime Pricing, Voice Pricing, at <http://www.globalstarusa.com/en/airtime/voicepricing/> (last visited July 27, 2005).

¹⁵¹ Wireless VoIP services are nomadic in the sense that one can use them from a number of different locations (for example, by using a laptop at different internet cafes all over a town).

firms that offer nationwide service and firms that can only offer regional and local service. We focus particularly, however, on those carriers that offer competitive nationwide service plans. We find that such firms include the five facilities-based nationwide carriers (Cingular, Nextel, Sprint, T-Mobile, and Verizon Wireless) and three large regional firms (ALLTEL/Western Wireless, U.S. Cellular Corp. ("USCC"), and Dobson Communications Corporation ("Dobson"))¹⁵². Other regional and small firms are typically unable to offer national mobile telephony that can compete effectively with the various price and non-price components of the national services offered by the larger carriers.

60. PTT is an important part of our analysis because of the wide range of carriers that make such an offering available to consumers. Therefore, we discuss major carriers in the United States that offer some form of PTT. Such carriers include Sprint, Verizon Wireless, and ALLTEL.¹⁵³ Nextel offers a bundled service which includes nationwide PTT and interconnected mobile voice. Sprint offers nationwide PTT as an add-on to its interconnected mobile voice service.¹⁵⁴

d. Input Market for Spectrum

61. We evaluate whether spectrum is within the input market for provision of mobile telephony service by examining its suitability for mobile voice service, its physical properties, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony. The input market currently includes cellular, PCS, and SMR spectrum and currently totals approximately 200 megahertz of spectrum.¹⁵⁵ We find that BRS/EBS 2.5 GHz spectrum is not considered in this input market because 2.5 GHz spectrum is committed to non-mobile telephony uses currently and for the near-term future, due to the historical configuration of the band and the multi-year transition process needed to reconfigure the band.¹⁵⁶ Our determination that this approximately 200

¹⁵² The number of subscribers for Dobson more than doubled from year-end 2002 (approximately 768,000) to year-end 2003 (approximately 1,552,000). See *Ninth Competition Report*, 19 FCC Rcd at 20697, tbl. 4 & n.2. In addition, Dobson has announced launch of its Enhanced Data for GSM Evolution ("EDGE") service. See *Dobson launches EDGE services in 16-state service area*, RCR WIRELESS NEWS, Oct. 18, 2004, at 22.

¹⁵³ Other smaller regional carriers, such as Southern LINC Wireless, may provide competitive PTT options in certain local markets.

¹⁵⁴ See Sprint Voice Features website.

¹⁵⁵ The approximately 200 MHz of spectrum includes 50 MHz for cellular services, 120 MHz for Broadband PCS, see *Ninth Competition Report*, 19 FCC Rcd at 20632-3 ¶¶ 86-88, and additional spectrum for SMR. See *id.* at 20633-34 ¶ 89 & n.197.

¹⁵⁶ In *Cingular-AT&T Wireless*, we noted that Advanced Wireless Service ("AWS") and Broadband Radio Service ("BRS") spectrum does not currently meet our criteria because it is committed to non-mobile telephony uses currently and for the near-term future. *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21561 n. 283. Subsequent to the adoption of the *Cingular-AT&T Wireless Order*, Congress adopted the Commercial Spectrum Enhancement Act, Public Law No. 108-494 (2004), enabling the Commission to announce its intent to auction AWS licenses as early as June 2006. FCC to Commence Spectrum Auction that Will Provide American Consumers New Wireless Broadband Services, News Release (rel. Dec. 29, 2004). Accordingly, some portion of the AWS spectrum may well be licensed in the near-term future. Nevertheless, given the federal and non-federal encumbrance of the 1710-1755 MHz and 2110-2155 MHz bands in many markets, we conclude that it is still premature to classify the AWS spectrum as suitable for the provision of mobile telephony services for purposes of our analysis here. Moreover, we observe that the Commission's *Rebanding Orders* will alter the bandwidth held by Sprint Nextel and which will be made available to the market. This will result in less available total bandwidth but will provide more contiguous spectrum suitable for the provision of advanced mobile services. We anticipate that in the future, as more spectrum becomes available, technological developments lead to performance advances, and allocations are revised, the Commission may from time to time need to re-evaluate whether additional spectrum should be viewed as suitable for the provision of mobile telephony services.